



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

October 24, 2013

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Daniel Hernandez**
Tax Registry No. 934333
Police Service Area 9
Disciplinary Case No. 2009-0279

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The above named member of the service appeared before Assistant Deputy Commissioner Claudia Daniels-DePeyster on March 7, 2012, March 20, 2012, May 25, 2012, February 7, 2013, March 7, 2013, April 29, 2013, and May 23, 2013, and was charged with the following:

DISCIPLINARY CASE NO. 2009-0279

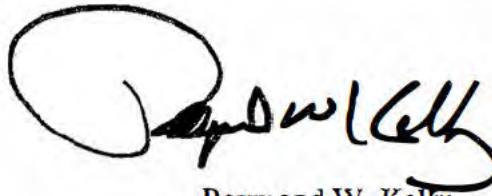
1. Said Police Officer Daniel Hernandez, assigned to the 79th Precinct, while on-duty, on or about July 22, 2008, at a location known to this Department, in Kings County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer did discharge his firearm outside of Department guidelines.

P.G. 203-10, Page 1, Paragraph 5

**PROHIBITED CONDUCT
GENERAL REGULATIONS**

In a Memorandum dated October 10, 2013, Assistant Deputy Commissioner Claudia Daniels-DePeyster found Police Officer Daniel Hernandez Guilty of Specification No. 1 in Disciplinary Case No. 2009-0279. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

In consideration of Police Officer Hernandez's otherwise good disciplinary history and service record, he shall not be immediately dismissed from the Department. Police Officer Hernandez's dismissal shall be held in abeyance for a period of one year (dismissal probation). Therefore, Police Officer Hernandez shall forfeit thirty (30) vacation days and be placed on One (1) Year Dismissal Probation, as a disciplinary penalty.



Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings

-X-

- against -

: FINAL

Police Officer Daniel Hernandez

: ORDER

Tax Registry No. 934333

: OF

Police Service Area 9

: DISMISSAL

-X-

Police Officer Daniel Hernandez, Tax Registry No. 934333, Shield No. 25150,
Social Security No. ending in [REDACTED] having been served with written notice, has been
tried on written Charges and Specifications numbered 2009-0279 (86014/09) as set forth
on form P.D. 468-121, dated December 9, 2009, and after a review of the entire record,
Respondent has been found Guilty as charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the
Administrative Code of the City of New York, I hereby DISMISS Police Officer Daniel
Hernandez from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE:



POLICE DEPARTMENT

October 10, 2013

In the Matter of the Charges and Specifications : Case No. 2009-0279
(86014/09)

- against - :

Police Officer Daniel Hernandez :

Tax Registry No. 934333 :

Police Service Area 9 :

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Penny Bluford-Garrett, Esq.
Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Shahin Mashhadian, Esq.
Cronin & Byczek, LLP
1983 Marcus Avenue Suite C120
Lake Success, New York 11042

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on March 7, 2012, March 20, 2012, May 25, 2012, February 7, 2013, March 7, 2013, April 29, 2013, and May 23, 2013, charged with the following:

1. Said Police Officer Daniel Hernandez, assigned to the 79th Precinct, while on-duty, on or about July 22, 2008, at a location known to this Department, in Kings County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer did discharge his firearm outside of Department guidelines.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT – GENERAL REGULATIONS

The Department was represented by Penny Bluford-Garrett, Esq. and Daniel Maurer, Esq., Department Advocate's Office. Respondent was represented by Dominick Revellino, Esq. for the first three days of trial and by Shahin Mashhadian, Esq. for the remaining days of trial.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Ahmed Evans, Detective George Boston, Police Officer Tanisha Greenaway, Police Officer Laretha Jordan-Miller, and Detective Darrell Corti as witnesses.

Ahmed Evans

Evans testified that he moved to [REDACTED] in July, 2011, but before moving there, he resided in New York. He moved to [REDACTED] because “[u]nder the circumstances of me being in the physical form which I’m in now, it’s a better service out there as far as for [REDACTED] and just getting around. And the cost of living is different.” He had searched for a facility that could have accommodated his condition in New York, but had been placed on a waiting list. He agreed that his apartment in [REDACTED] is conducive to him being in a wheelchair.

Evans said that he is 38 years old and has been employed as an audio engineer for 21 years. As an audio engineer, he had set up sound systems for different celebrations such as birthdays, retirements and weddings. He said he had done over 25 parties within a year. He agreed that he did not work in as many parties as he did prior to becoming wheelchair bound. Evans said, “It’s a little bit different for me – I was standing before and it’s a different posture and a different feeling as opposed to sitting down. Sitting down doesn’t give you that same feeling that you get.” He continued, “When you look at the crowd, you could feel the same thing they’re feeling from standing up and you can feel overhead. With me sitting low, I can’t feel nothing but bass, and I can only see little but little bit of body movement.”

Evans said his father served with the New York City Department of Correction for 35 years and his mother was a detective in the Department’s Transit Bureau for 30 years. Evans’ father passed away in 2009. At the time his father passed away, Evans was in [REDACTED] recovering from the injuries he sustained from this incident.
[REDACTED]

In the summer of 2008, Evans met Person A on a networking website. After [REDACTED], their relationship “ended badly.” Evans said that everything seemed to be “going good until the [REDACTED] started coming up and she started having issues with that and it kind of collapsed into [their] relationship.” He and Person A were involved in a physical altercation during which they both struck each other. Evans was arrested and an Order of Protection was issued against him. He was supposed to stay away from Person A at a certain distance, and to not contact her by telephone or e-mail. He was arrested for violating that Order of Protection. He stated that he did not stay away from Person A after she had taken the Order of Protection against him because there were unresolved issues between them that he wanted to resolve. Evans said he wanted to be there for Person A and help her.

Evans testified that on July 22, 2008,¹ at around 10:00 p.m., he was on [REDACTED] [REDACTED], at a social gathering with his family and friends. After spending some time there, Evans decided to go to his friend’s residence [REDACTED], which required Evans to pass by Person A’s residence. Evans did not know for sure if, while at the gathering, he had an alcohol beverage, but agreed that he had a couple of drinks.

Evans testified that he did not intend to go to Person A’s residence, but was just passing by it because it was on his way to the train station. He said he was headed toward [REDACTED] Person A’s apartment was on the corner of [REDACTED]. Evans walked through [REDACTED] subway station. As he passed the corner of [REDACTED]

¹ In her opening statements, the Assistant Department Advocate stated that Respondent and his partner responded on July 21, 2008, at around 11:35 p.m., to a job involving a violation of an Order of Protection.

[REDACTED], he encountered Person A. Evans said Person A "went into a hysterical rage...she was surprised, she was caught off guard, she was scared."

Person A cursed at Evans and they both shouted at each other. Evans recalled that Person A said, "[W]hy were you here? What the F are you doing here, why are you coming around?" Evans explained to Person A that he was not there to see her, but he was just passing by as he was walking toward the subway station. Person A called the police and Evans walked away.

Evans walked down [REDACTED], turned right on [REDACTED], walked to the end of the block and then encountered a radio motor patrol car (RMP). In the RMP, Evans observed Respondent in the driver seat; another officer (Respondent's partner, Police Officer Laretha Jordan-Miller) in the passenger seat; and Person A and Person A's son, Person B, in the rear seat. Respondent asked to speak to Evans, but Evans, aware that he was going to get arrested, ran away from Respondent. He said he ran because he was afraid and did not want to go back to jail, and did not want to deal with this issue anymore. Evans was carrying a blue Nike knapsack, which had a box cutter inside. He said he used the box cutter to slice wires and to open boxes while at work. He denied carrying a gun.

Evans ran, Respondent chased after him and grabbed and removed his knapsack. Evans continued running without his knapsack and hid underneath a blue van on [REDACTED]. Evans testified that he was carrying a black cell phone on the left-hand side of his waist because he is left-handed. While running away from Respondent, Evans did not

recall if Respondent had said anything to him. He also did not recall where Respondent's partner was.

Evans recounted that, "There weren't bright lights on that block. There was a pole -- a light pole out there, maybe one, and then like, I guess, for about six cars down you probably have another, but there were so many trees on that block so it's hard to see, so it's kind of dark at various places." He stated that he was toward the front of the van, aligned with the tire on the driver's side, on his stomach. He said, "[The van] wasn't that high. I would say two to three feet -- well, not feet but inches. I don't know how you measure a van from the ground up, but it was enough for me to get under there but it's not enough where you can turn over."

Evans said that while he was underneath the van, he observed someone walk past him but did not know who it was. Evans then saw Respondent's feet about two or three feet in front of the van. Evans did not know if there was anyone else around when he observed Respondent's feet.

He recalled that "[Respondent] told me not to move or else he was gonna shoot me." Evans said, "I didn't say nothing. I just moved back, and before I moved -- by the time he -- he was saying what he said, I moved back. He reacted." Evans said that when Respondent ordered him not to move, he only observed Respondent's legs. He also said that Respondent's voice was "high," and that Respondent gave him the command one time. Evans denied that anyone else said anything to him while he was under the van.

Evans observed Respondent's gun after he had been shot. He observed another person on the right side of the van but did not know who it was. He said that the person

was "right up on the van, on the sidewalk," but he could not estimate how far away that person was from the van. Evans did not recall that person saying anything to him.

Evans testified that he had been shot one second after Respondent gave him a command not to move. Upon receiving the command from Respondent, Evans moved backwards. Evans said that, while underneath the van, he also reached for his cell phone to try to call for help. When asked if he reached for the cell phone with his right hand or left hand, Evans said, "My right. I couldn't get into my left." After he was shot, Evans said to himself, "He just fucked up." Evans tried to move but was not able to. He said, "[M]y whole body seemed to just stop moving. I couldn't move my legs. I couldn't get myself from underneath the van." With regard to his position underneath the van at the moment that he was shot, Evans said, "I was positioned on the floor, on my stomach. On the floor, on my stomach just trying to look out. Trying to see if I can move." He continued, "I got shot in my back, from the left -- left side of my shoulder, and the bullet traveled to the right side of my muscle on my right arm." At trial, Evans showed the entry of the bullet wound, which the Court observed to be below the neckline or nape, by the left top of his shoulder.

Evans remained underneath the van until an ambulance arrived and then he was "pulled" out by an unknown officer. Evans said he screamed while the officer pulled him out by both of his hands. Evans was placed in handcuffs while he was in the ambulance, but he did not recall who placed the handcuffs on him. He remembered emergency medical technicians speaking to him in the ambulance, and he had on an oxygen mask.

After he was shot, Evans observed Respondent standing in front of the van with his gun in his hand. He then observed Respondent's partner walk up to Respondent and

take his gun away. Evans did not hear the conversation between Respondent and his partner. Evans denied that he carried a firearm that evening either in his knapsack or on his person and also denied that he owned a gun. He said he carried compact discs, headphones, deodorant, flyers, wires, a box cutter and some personal items in his knapsack.

Evans agreed that he had been involved in previous altercations with Person A and that he had told Person A that he had a gun. He told Person A he had a gun because he was afraid of what Person A might have done to him. Person A "knows a lot of people in the area" who were protective of her and he was afraid of getting "jump[ed]" by them. He told Person A about the gun about three or four weeks prior to this incident. Evans did not describe the gun nor show the gun to Person A. He agreed he threatened Person A and told her, "I got a gun. I got a gun. You better leave me alone."

Evans recalled he was taken to [REDACTED] Hospital after he had been shot but did not recall what occurred when he arrived there. He was at the hospital for at least four or five months and remained in handcuffs. Evans learned from his doctor that he was a "T4" paraplegic and that he would not be able to walk unless he received physical therapy. But he was also informed by other doctors that he would not walk again.

Evans said he was placed under arrest at [REDACTED] Hospital for the incident between him and Person A and then he was transferred to [REDACTED] Hospital, where he received physical therapy for six months. After spending six months in [REDACTED] Hospital, Evans was moved to Rikers Island where he remained for six months. Evans testified that he had pleaded guilty to the charges that resulted from this incident.

After Evans was released from Rikers Island, he was not able to find housing and ended up going to a medical facility on [REDACTED] in [REDACTED]

(Department's Exhibit [DX] 2A (photograph 19) is a photograph indicating the intersection of [REDACTED]. DX 2B (photograph 35) is a photograph of a black Volvo and a van on [REDACTED]ue. (DX 2C [photograph 41] was marked for identification). DX 2D (photograph 50) is a photograph of a blue Nike knapsack. DX 2E (photograph 58) is a photograph depicting the contents of Evans' knapsack (excluding the box cutter). DX 2F (photograph 59) is a photograph of a yellow and black box cutter. DX 2G (photograph 55) is a photograph of the back of Evans' shirt on the incident date. DX 2H (photograph 57) is a photograph of the front of Evans' shirt.)

During cross-examination, Evans agreed that Person C is [REDACTED]. Evans agreed that a domestic incident occurred on March 13, 2002, between him and Person C but denied that he pushed Person C to the floor, punched her in the face and choked her. Evans also denied that on March 30, 2002, he bit Person C's hand to stop her from calling the police. He further denied that on May 25, 2002, he hit her three or four times on the face and caused her face to bleed and swell.

Evans denied having a verbal dispute with Person C on September 22, 2002. He agreed that on October 8, 2002, he argued with Person C, and when she tried to leave, he stood in front of the door. Evans did not recall an incident on December 24, 2002, and denied that he punched Person C in her mouth during the dispute which caused her lip to bleed and swell. Evans recalled an incident on May 1, 2006, in which he argued with

Person C about their children. However, he denied hitting her when she tried to stop him from leaving the house. He maintained that it was just a verbal dispute.

Evans acknowledged that he knows Person D but did not recall the incident on August 17, 2006, where Person D wanted to call the police but he took the phone away from her and said, “[I]f you call the cops, I’ll fucking hurt you.”

Evans recalled an incident with Person A on November 1, 2007, but denied having punched her in the back of the head and face. He stated that Person C hit him first and then he hit Person C, but did not recall where on her body he hit her. Evans recalled that on July 7, 2008, at about 1:00 a.m., after he was released from Brooklyn Central Booking, he walked past Person C’s residence, but did not recall what Person C said to him. He denied that he said, “[Y]ou’re a busted bitch.”

Evans recalled that on March 3, 1997, he was arrested in [REDACTED] for driving without a license and served one month in jail. He did not recall if he was arrested for assault in the third degree on February 16, 1998, nor did he recall if he pleaded guilty to assault in the third degree on July 30, 1999.

Evans did not recall if he was arrested for assault in the first degree on July 23, 1998. He did not recall having been arrested on May 25, 2002 for aggravated criminal contempt nor did he recall having pleaded guilty to criminal contempt in the second degree, disobeying a court order, on August 5, 2002.

Evans recounted having been sentenced to three years probation, and having an Order of Protection issued against him on September 23, 2002. Evans also recalled having been arrested for intent to obtain transportation without paying on October 1,

2002.

Evans agreed that the aforementioned crimes were "petty."

Evans recalled having been arrested for trademark counterfeiting, failure to disclose the origin of a recording in the first degree, on January 18, 2008, and further recalled having pleaded guilty to trademark counterfeiting in the third degree on February 19, 2008. He recalled having been sentenced to a jail term as a result.

He did not recall having been arrested for assault in the third degree on November 1, 2007, and also did not recall having pleaded guilty to this charge on February 19, 2008.

Evans recalled having been arrested on February 19, 2008, for criminal contempt in the first degree for violating an Order of Protection and resisting arrest. He also recalled having pleaded guilty to criminal contempt in the second degree, and disobeying an order, on June 17, 2008.

Evans agreed that he lay on his stomach while underneath the van but did not recall if his hands were underneath him in a "push-up" position. He acknowledged that while he was underneath the van, "somebody" had alerted the police that he was there, but he did not recall how long before the police were alerted of his location.

Evans agreed that the distance between the ground and the bottom of the van was similar to the distance between the floor and the bottom of the court officer's table in this forum. The distance from the floor to the bottom of the court officer's table, as measured by the court officer, was eight inches. However, Evans maintained, "There's space underneath the van about maybe two or three inches. Maybe. I'm not accurate with the height and the range and all that but all I know is that that's how much space."

He stated that he went underneath the van from the passenger side, which was also the side closest to the sidewalk. He said he was underneath the van for about five minutes before he saw Respondent. Evans acknowledged that Respondent was on his left side, about two or three feet away, when Evans first observed him from underneath the van. Evans saw Respondent "from the waist down." Evans agreed that when he first slid underneath the van, Respondent was not able to see him. Evans further agreed that he observed Respondent walk past the van but then stop because someone alerted Respondent that Evans was underneath the van. He then observed Respondent walk toward the van.

Evans maintained that he was between the front wheels (middle) of the van. Evans said Respondent shot him in the shoulder while Respondent was standing two or three feet away from Evans and while Evans was on the ground, on his stomach, underneath the van. Evans agreed that he felt the bottom of the van on his back and that "there was not much room" between the top of his back and the bottom of the van.

After his encounter with Person A on [REDACTED], Evans turned left onto [REDACTED] Avenue, turned right onto [REDACTED] and then encountered Respondent's RMP on the corner of [REDACTED]. Evans turned around and ran down [REDACTED]. Evans denied having encountered Respondent at the intersection of [REDACTED]. Evans stated he ran a distance of two car lengths and then slid underneath the van. He said Respondent grabbed his knapsack in "this area between the van. The area - - it's between the two cars and the van [indicating on the scale marked as DX 1]." Evans said he did not know how Respondent

did not see him slide under the van, stating, "I was told that [Respondent] said it was too dark."

Evans maintained that he was underneath the van for about five minutes before he was found. Evans did not recall how many times Respondent gave him a command to not move while he was underneath the van. Both parties stipulated that Evans said he was given the command once by Respondent.

Evans denied that he told Person A that he had a gun at some point before July 21, 2008.

Evans agreed that he was shot while he was underneath the van. He indicated that more RMPs arrived before the ambulance arrived, and he agreed that he was pulled from underneath the van by "ambulance attendants."

During redirect examination, Evans acknowledged that he did not know Respondent prior to the incident. Evans further acknowledged that he did not have a gun, a box cutter in his hand, or any other knives in his possession on the night in question. When asked to explain what he meant by "two to three inch[es] from the bottom of the van and your body," Evans said, "Exactly more of the bottom of my body and the van itself. There is not much space to turn underneath the vehicle and so I could not turn at all so in order for me to move, you could either go forward or you move backwards," he continued, "or you go left or you go right when I was in the position on the floor on my stomach."

Upon being questioned by the Court, Evans stated that he was lying on his stomach underneath the van. His head was toward the front of the van, and he was positioned closer to the driver side.

Detective George Boston

Boston is a 27-year member of the Department. He has been assigned to the Crime Scene Unit (CSU) for about 20 years and has responded to over a thousand crime scenes. On July 21, 2008, Boston responded to the crime scene in question and conducted a walk-through to identify any evidence that would need to be documented. He then started a sketch of the scene, but another officer who arrived at the scene prepared the actual sketch of the scene. Boston explained that at police-involved shootings, another officer usually assisted him in preparing the sketch. DX 1 is a sketch of the scene in question, prepared by Detective Josephine Curry.

After photographing the scene, he marked, documented, collected and again photographed the evidence. DX 2I is a close-up of a discharged shell labeled number one. DX 2J is a photograph of a discharged shell, north on [REDACTED]. DX 2C is a photograph of items labeled 2, 3, 4, 5 and 6, which were recovered at the scene.

Boston searched the entire scene and documented all evidence. He even searched about two blocks away from the crime scene to be certain that he did not miss any evidence. In a situation where evidence in a crime scene has been moved, Boston would speak to the member of the service who moved or touched the evidence. Boston only recovered one firearm from the scene and it belonged to Respondent. He also recovered one shell casing, but he did not know which weapon the shell casing was fired from.

During cross-examination, Boston stated he did not have a post-graduate degree nor does he have an educational background in criminal justice. In 2008, Boston examined about 70 to 80 crime scenes and drew a sketch on each occasion. DX 1 is an electronic sketch that was not prepared by Boston; he had prepared an earlier sketch but

another officer (Curry) had prepared the electronic sketch of the scene. Boston has taken classes in preparing electronic sketches and presently teaches courses in electronic sketching.

Boston arrived at the scene about an hour after the incident and spoke to Detective Katina and Sergeant Coughlin. Boston explained that he did not get to the scene sooner because CSU is a citywide unit and it is located in Queens County. Upon being notified of an incident, Boston has to gather his equipment and then make his way to the scene.

Boston explained that it is possible to determine the approximate location of the shooter based on the shell casing. However, it is approximate because factors such as wind and elevation of the street might displace the shell casing. Boston did not know whether the shell casing was moved. He did not know that an arrest had been made but was told that the shooter was Respondent. He did not speak to Respondent about the incident. Boston did not know where the victim's body was positioned at the time of the incident, nor did he investigate it. Evans had already been removed to the hospital before Boston arrived at the scene. Boston stated that he did not analyze the gray van (as depicted in DX 2J) because there was no reason to; however, he did examine the van. Boston was working with Detective Phillip Matthews and another member who assisted him by documenting evidence and drawing the sketch.

Boston examined [REDACTED] and [REDACTED]. He walked up and down the streets a "few times" using a heavy duty flashlight to search for evidence. He indicated that he did not recover a gun. He arrived at the scene at about 1:00 a.m. and finished at about 6:00 a.m. or 7:00 a.m. During the search, Boston went only into one backyard of a house because it was open. He did not go in other backyards as they were

closed to the public. Boston said that he searched underneath the gray van but did not check the undercarriage. He looked at the rear bumper but did not know if it was possible to look inside the bumper. He also did not dust for fingerprints because "we are not looking for any outstanding subjects or anything...." Two knives were submitted for latent fingerprints but Boston did not examine them.

Upon questioning by the Court, Boston stated that while he was assigned to CSU, he has taken numerous forensics training courses, including about three or four courses offered by the Federal Bureau of Investigation. He also takes continued education training.

Police Officer Tanisha Greenaway

Greenaway is a seven-year member of the Department. She was assigned to the 79 Precinct at the time of the incident and performed a tour of 11:15 p.m. to 7:15 a.m. She was assigned to patrol and responded to a domestic dispute job involving a violation of an Order of Protection in the vicinity of [REDACTED]. Another unit was already responding but Greenaway and her partner, Police Officer Joseph Beneduce, decided to assist them. Upon arriving to the scene, Greenaway observed Respondent with his firearm drawn toward Evans, who was between two cars, and Jordan-Miller was standing directly across from Respondent.

When Greenaway first observed Evans, she said, "I believe he was face up. I was not able to see his body completely because one of his hands was underneath a vehicle and he was just laying there." She stated that Respondent was about three to four feet away from Evans and Jordan-Miller was on the sidewalk, about five feet from Evans. She said Evans was in pain, yelling and moving. She turned Evans over to his stomach

and tried to handcuff him but pulled herself away because she got Evans' blood on her handcuffs. Another member who was wearing gloves placed Evans in handcuffs. She said "numerous" members responded to the scene. After Evans was placed in handcuffs, Greenaway searched him but did not recover a firearm. Greenaway only observed some flyers on the ground, and she retrieved Evans' wallet from one of his pockets. She did not find a gun on his person. She did not recall if Respondent or Jordan-Miller had said anything at the scene.

Greenaway did not recall how long she remained at the scene but she accompanied Evans to [REDACTED] Hospital in the ambulance. She did not recall where Evans was shot but thought it might have been his back or side. Greenaway said that Evans kept complaining about how much pain he was in, and he wanted to turn over and have his handcuffs removed. Evans talked about how much he was going to get paid from the "NYPD." Greenaway was relieved by another member at the hospital, and then she returned to the precinct to invoice Evans' property.

At the precinct, Boston gave Greenaway a printout of "what the voucher should look like and what should be vouchered in each evidence bag." Greenaway agreed that she followed these instructions. She testified that she did not recall vouchering a gun in connection to Evans.

During cross-examination, Greenaway stated that she and Beneduce were the first members on the scene. She stated that a violation of an Order of Protection job does not normally come across as a priority job but it should because the person in violation of the order might still be on the scene and could be dangerous.

Greenaway said that after Evans was placed in handcuffs, she pointed her flashlight to where Evans was laid underneath the van, but did not examine the undercarriage or the inside of the front or rear bumper of the van. Greenaway could not see Evans' hands while he was under the van. While in the ambulance en route to the hospital, Evans said, "I'm about to get paid." Evans continued to scream. Greenaway said, "[H]e was just moving a lot." Evans did not comply with Greenaway's orders from the time she arrived on the scene. Greenaway also stated that she invoiced a knife and a box cutter.

When Greenaway first arrived at the scene, she noticed only half of Evans' body underneath the van, "It was diagonal. I believe his legs were out and some of his upper body was under the car."

During redirect examination, she said she did not recall where the knife or the box cutter was recovered from. According to the Property Clerk Invoice, the [kitchen] knife was recovered from the yard [REDACTED].

Greenaway testified that when she arrived at the scene, Respondent was standing and covering Evans, and Respondent's partner stood on the sidewalk, opposite of Respondent. She did not recall what Respondent's partner was doing. Respondent was standing still and Evans was lying on his back. Greenaway testified that she did not see or hear Respondent discharge his firearm. She said that "[i]t seemed like seconds" from the time that Evans was shot and when she arrived on the scene. She did not know Evans was shot in the back when she turned him over to his stomach to handcuff him. She said Evans' one hand and shoulder were under the van. She agreed Evans was lying toward the front of the car, parallel with the bumper. She testified that she did not pull Evans out

from underneath the vehicle and did not know if, prior to her arrival on the scene, anyone pulled him out from underneath the vehicle.

During examination by the Court, Greenaway stated that while Evans was under the van, "I could not see his arm. I believe his feet were towards the street and his head was towards the side. That's how - - [t]hat is what I believe."

Police Officer Laretha Jordan-Miller

Jordan-Miller, a 17-year member of the Department, assigned to the 79 Precinct, testified that on July 21, 2008, she was partnered with Respondent and scheduled to work from 11:15 p.m. to 7:50 a.m. She stated that at about 11:00 p.m.², she and Respondent responded to a job involving a violation of an Order of Protection. When they arrived at the scene, two individuals, Person A (the victim) and another male (later identified as her son, Person B), told Jordan-Miller that "he [Evans] just left," and that Evans violated an Order of Protection. Person A told Jordan-Miller that she believed Evans had a gun. Person A and the other male got in the backseat of the radio motor patrol car (RMP), and Respondent and Jordan-Miller conducted a canvass of the area. Person A did not indicate whether Evans displayed a firearm.

Jordan-Miller stated that at the corner of [REDACTED] and [REDACTED] Person A pointed out Evans. Respondent exited the vehicle and said, "[C]an I speak to you a minute? And as he [Respondent] is getting out of the car, Mr. Evans scooped his head down like in a slouch area to look in the back of the car, and he saw, he saw the people in the back of the car, then he takes off running." Respondent and Jordan-Miller

² Based on the phrasing of the question by the Assistant Department Advocate, Jordan-Miller agreed to responding to the job at 11:00 p.m., when in fact, her tour did not start until 11:15 p.m.

then chased Evans. Respondent got close enough to grab Evans' backpack but was not able to grab it. They ran down Throop Avenue, but Jordan-Miller lost "a little bit of sight" of them as Respondent and Evans turned onto Vernon Avenue. Jordan-Miller did not observe a suspicious bulge or a firearm on Evans.

After turning onto Vernon Avenue, Jordan-Miller observed Respondent "in the street, and I turn onto the sidewalk area, and I don't see Mr. Evans anymore. He is like, he is right there, he is right there, which was indicating that [Evans] was underneath a vehicle." She continued, "So as [Evans] is underneath the vehicle, [Respondent] is looking and I'm looking down, and we are telling him, both yelling, don't move, don't move. Then [Evans] comes from underneath this vehicle in this motion of raising his hands up, and it looks like he is actually coming up with something."

Jordan-Miller then heard a "pop." Jordan-Miller was not able to see Evans' waistband area or a weapon while Evans was underneath the van. It was close to midnight and dark, but Jordan-Miller did not recall using her flashlight to look under the van. Respondent said to Jordan-Miller, "[H]e [Evans] is right there, he is right there," but did not indicate that Evans was underneath the van. She said, "So I am looking for him, but by the time I position myself in front of the van now, he's coming out with his arm coming up." Jordan-Miller's firearm was still drawn. She stated that she first drew her firearm "[f]rom the beginning. From the very beginning of him taking off running." Her firearm was still drawn when she approached the van. Upon reaching the van, she heard a "pop" and she yelled, "[D]on't move, don't move. And he is still moving."

Jordan-Miller stated she was standing about one car length away from Respondent and Respondent was standing "at the head of [Evans]." She was only able to

see Evans' upper body, above his waist area. After she heard the "pop," she and Respondent continued to yell, "[D]on't move." Jordan-Miller said she was unsure who was shot when she heard the pop. She thought that she had been shot. She said, "Then I heard him [Evans] say, you shot me. At that point, I holstered my gun and I told [Respondent] to holster his."

During cross-examination, Jordan Miller agreed that Respondent was a good partner. She also agreed that a description of a firearm is not necessarily important when responding to a job involving a firearm. She observed Respondent turn onto [REDACTED]

[REDACTED] Respondent made a "tactical" turn as he made a wide turn and stopped on the corner to take a quick look before turning.

While Evans was underneath the van, Jordan-Miller and Respondent screamed from the top of their lungs, "[D]on't move" several times but Evans did not comply. She agreed that Evans' head was pointed toward Respondent, and his feet were toward her. With regard to Evans coming out of the van, Jordan-Miller said, "He wasn't lifting himself up, he was rolling....He wasn't getting up from the ground, he was still on the ground, from what I recall." Jordan-Miller stated that it was her decision to draw her weapon. She agreed that Evans was still moving after he was shot. When asked if Respondent's firearms discharge seemed to be outside of the guidelines to her, Jordan-Miller replied, "No."

During redirect examination, Jordan-Miller said Person A did not specify where Evans was carrying his firearm.

Jordan-Miller had asked Respondent to holster his firearm because she (after the shot was fired) stood in front of Respondent. They were both nervous and she wanted to

prevent an accidental discharge. At the time that she and Respondent holstered their firearms, Jordan-Miller did not know whether Evans had a firearm or not.

During recross-examination, Jordan-Miller said she told Respondent to holster his firearm after she saw the turret lights of other RMPs. She said she did not recall that it was within Department rules and regulations to holster one's weapon when other units arrive, but stated, "I just asked [Respondent] to do that for my safety because he is directly in front of me." When asked whether Evans was entirely in the open between the two cars when Respondent discharged his weapon, Jordan-Miller responded, "Entirely in the open? I don't recall his entire body being out in the open until I heard the pop and he was still rolling."

Upon questioning by the Court, Jordan Miller agreed that when she first observed Evans from a frontal view, she did not notice a bulge that would indicate that he was carrying a weapon on his person.

Jordan-Miller stated that she observed Evans "coming out from the van, what I could see was his hand in a motion coming up from his waist." She did not recall if Evans was face down. She said, "[H]is body is like coming out from the van, and what my total focus was on his hand was reaching out to come up. So in my head, I'm thinking, my God, he has a gun. That's when I heard the pop, and I'm thinking I got shot." Jordan-Miller described Evans' motion while he was underneath the van and the Court noted it as follows: Evans' hands were by his waist area and his hands came up and out in an outward motion.

On redirect examination, Jordan-Miller agreed that when she heard the pop and thought that she had been shot, she reached for her chest, which she indicated is "center mass." She did not discharge her firearm.

Detective Darrell Corti

Corti is a 20-year member of the Department and he has been assigned for about 14 years to the Firearms and Tactics Section (FTS), where he is the Master Instructor and the Training Coordinator. He is responsible for all training curriculum in FTS. Corti said that he has taught at least a thousand courses while assigned to FTS. He has served in the military for 28 years, and is a Master Sergeant in the United States Air Force military police. He has been a firearms instructor for the Air Force since 1997.

Corti explained that whenever there is a firearms discharge by a member of the Department, a preliminary Shooting Report is generated by the Shooting Team Captain and is forwarded to the Chief of Department through channels. FTS also receives a copy of that preliminary report. FTS reviews every shooting incident "to glean information to better understand what our officers are going through...to help revise and update lesson plans and tactics that are taught...."

DX 3 is a Department memorandum from the Commanding Officer of Patrol Borough Brooklyn North Investigations Unit to the Chief of Department, Firearms Discharge Review Board, regarding the firearms discharge by Respondent.³ Corti explained that this memorandum is considered a preliminary shooting incident report.

³ Attached to the back of that memorandum is a memorandum from the Chairman of the Patrol Borough Brooklyn North Firearms Discharge Advisory Board to the Chairman of the Department Firearms Discharge Review Board, with their findings and recommendation. The Board found that the firearms discharge was in violation of Department guidelines and recommended Charges and Specifications.

Upon reviewing DX 3 and being asked if it was reasonable for Respondent to use "deadly physical force" against Evans, Corti said that in his professional judgment, "I would say I don't feel that there was enough probable cause to warrant that action." He did not believe there was enough reasonable cause to warrant that action either.

Corti became the training and curriculum coordinator of FTS in 2004, and he has reviewed thousands of preliminary Shooting Reports since then. Corti reviewed DX 3 for information about what had occurred, the decisions Respondent made and whether the firearms discharge was reasonable or justified. Corti said Respondent placed himself in an open location where he could not seek cover. Corti trains members to seek cover in a situation where a perpetrator has a firearm. Corti also stated that Respondent should have created distance between himself and Evans and waited for Jordan-Miller before making a coordinated decision to use the minimum amount of force necessary to effect the arrest. Respondent should have also used a flashlight as the area under the van was dark. Several techniques for holding a flashlight and firearm simultaneously are taught during tactical training in FTS.

Corti testified that during training, members are taught about different levels of fears and that fear cannot be the sole factor in determining the level of force to be utilized.

Also during FTS training, police recruits engage in realistic training where they are involved in role play scenarios where a perpetrator has a firearm. In such scenarios, the recruits have to coordinate with their partner before engaging the suspect. They are supposed to give verbal commands, create distance and seek cover.

Corti said that once Respondent was told that Evans might have a gun, he should have ascertained information such as the description of the firearm and whether Person A had actually observed the firearm. Respondent should have also looked for furtive movements by Evans and for the location of the firearm.

Corti testified that police recruits receive firearms and tactics training in the Police Academy, and upon becoming police officers, they must attend two firearms requalification sessions each year. Firearms requalification and proficiency are a condition of employment.

During *voir dire*, Corti stated that he has never met or spoken to Respondent before. Corti stated that he reviewed Respondent's prior firearms and tactical training, which is documented in the Firearm Qualification Management System. He said that Respondent had attended basic firearms and tactical training as a recruit, as well as every firearms requalification cycle since Respondent graduated from the Police Academy. Corti did not recall ever instructing Respondent in FTS.

Upon questioning by the Court, Corti stated that the flashlight techniques were introduced into the firearms requalification cycle in 2008. The Court deemed Corti as an expert witness with respect to firearms and tactics.

On continued direct examination, Corti determined that in his professional judgment, after reviewing the case, the amount of force Respondent used against Evans was unreasonable and outside of Department guidelines as delineated in §203-12 of the Patrol Guide.

During cross-examination, Corti agreed that, in his common sense judgment, the incident was outside Department guidelines. In a situation where a victim tells the police

that a suspect is dangerous, the victim fears the suspect because the victim and suspect had previous violent incidents. The suspect has access to firearms and may be armed, and when the police encounter this suspect, the suspect hides from the police and when the police find the suspect, the suspect reaches for an object in his waistband. In such a scenario, Corti said, "It can lead you to a reasonableness, but you still have to see what the person has. What is the threat? Do you physically see a threat that the person is trying to produce, or utilize, or threaten."

Corti agreed that §203-12 of the Patrol Guide does not require a member to actually see a firearm or any other weapon before using deadly physical force. He agreed that DX 3 is not completely accurate. For instance, the date of the incident is listed as July 22 in paragraph 1 and then July 21 in paragraph 3. In addition to DX 3, Corti read a secondary report of the incident. He testified that the secondary report contained Respondent's recollection of the incident. Corti did not speak with anyone about the incident nor did he go to the scene of the incident. Corti's testimony was based mainly on DX 3. Corti was not able to verify the complete truthfulness or accuracy of DX 3, nor did he recall when he actually read it.

Corti did not know what other witnesses to this incident testified to during their official Department interviews.

Corti agreed that during a foot-chase, a police officer who has a good faith belief that the suspect he is chasing may be armed, must make split-second decisions, and Respondent's decision to make a tactical turn was a good decision.

Corti stated that there are circumstances where a police officer cannot take cover.

Corti agreed that Respondent complied with Patrol Guide §203-12 in the sense that he yelled, "Police, don't move," and that he did not cock his weapon prior to discharging it. Respondent gripped his firearm with both hands supported, which Corti agreed was a proper way to hold a firearm.

When asked if a police officer should try to either get a flashlight or try to protect himself when he sees a suspect reaching for what he believes is a gun, Corti said that the police officer should try to protect himself. He agreed that officers are trained to protect themselves because their safety is paramount, as well as the safety of bystanders and even suspects. Corti was aware, based on his review of DX 3, that this was a non-fatal shooting.

Corti did not know whether a trajectory report was drafted. He only reviewed the preliminary report (DX 3) and the secondary report. He agreed that a suspect who is armed and on the floor can still discharge his firearm and that environmental settings, such as lighting, can be important in split-second decision making. He further agreed that police recruits are trained to handle domestic violence cases cautiously because they can be unpredictable. He acknowledged that there is a higher risk of unpredictability when a suspect flees after being approached by a police officer.

Corti said that, to his understanding, Evans had one weapon: the box cutter. A knife that was recovered was not in close proximity to Evans. Corti agreed that it is not uncommon for a fleeing suspect to dispose of a weapon while in flight.

Corti stated that Respondent did not have enough information to ascertain what the threat truly was. He explained, "You don't have to see a gun in order to use deadly physical force...you should be able to visualize what it is that you are discharging your

firearm at and for what reason." When asked what additional information Respondent should have had in order to have probable cause to discharge his firearm, Corti said it would have been "preferable" if Respondent used his flashlight and sought cover and distance, but he could not tell "what extra [information] you need to discharge your firearm."

During redirect examination, Corti stated that taking cover allows a police officer to create distance and grants time to make a decision. Corti explained that a flashlight could be utilized to illuminate the area for a better observational view. The flashlight beam could also be pinpointed onto the suspect's face where the suspect would not physically be able to see. Usually the suspect would raise his hands to block the beam of light, and thus produce his hands and what he has in his hands. Corti agreed that it was not a proper tactical decision to holster his [Respondent's] firearm after Respondent discharged his firearm because Evans had not been handcuffed and searched.

Respondent's Case

Respondent called Captain Timothy Trainor and Walter Signorelli, and testified in his own behalf.

Captain Timothy Trainor

Trainor is a 22-year member of the Department. He has been assigned as the Commanding Officer of the Patrol Borough Brooklyn North Investigations Unit for 11 years and investigates about 18 to 26 firearms discharges annually. Patrol Guide §212-29 provides the procedure for conducting firearms discharge investigations. He explained that the procedure mandates a Shooting Team Captain and an Investigation Team which,

depending on the nature of the incident, can consist of 5 to 30 individuals. Each unit in the team (the Investigations Unit, Detective Bureau, Crime Scene Unit, and Internal Affairs Bureau) will have a respective duty. Such duties can include conducting a canvass, door-to-door interviews and Department interviews.

After a preliminary scene examination and interviews are conducted, a Shooting Report is prepared by the Shooting Team Leader (Shooting Team Captain). All information available at the conclusion of the investigation is included in the Shooting Report. Additional and/or new information is included in a supplemental report. A supplemental report is almost always prepared, followed by a final report. Upon completion of the final report, a recommendation by the Commanding Officer of the respective Patrol Borough Investigations Unit is made. All reports and all other investigative materials are then forwarded to the Patrol Borough Firearms Discharge Advisory Board (The Board) for review.

During the review process, the Chair of The Board can either agree or disagree with the Commanding Officer's findings and recommendation. After reviewing the case, The Board issues a recommendation and forwards the case to the Chief of Department's Firearms Discharge Review Board (COD Board). He agreed that the COD Board can review evidence outside of the shooting folder, but typically base their decisions on the contents of the shooting folder.

Trainor was the Shooting Team Captain in this case and drafted the Shooting Report (DX 3) and conducted the investigation as per Patrol Guide §212-29. Trainor was present for every interview involving a member of the service, but was not present for interviews of civilian witnesses. He testified that there was an interview of a male

individual who called 911, but Trainor did not reference the male caller in his Shooting Report.

Evans had already been removed by the time Trainor arrived to the scene. Trainor did not interview or meet Evans. As part of his investigation, Trainor researched Evans' criminal background and found that Evans had been arrested numerous times for assault and criminal contempt. In addition, Trainor reviewed Respondent's Central Personnel Index (CPI), which indicates any Civilian Complaint Review Board (CCRB) complaints against him. Trainor did not recall if any CCRB complaints against Respondent were substantiated.

Trainor testified that the Commanding Officer of the respective Patrol Borough Investigations Unit determines whether the firearms discharge was within the guidelines provided by the Patrol Guide. In this case, it was Trainor who made this determination and prepared the final Shooting Report (DX 3).⁴ Trainor stated that this Shooting Report was included in the Shooting Report folder, which was then forwarded to The Board. He testified that no other evidence had surfaced after the submission of the final Shooting Report. When asked about the incident date being incorrectly written as July 22, 2008, in paragraph 1 of the Shooting Report, Trainor stated that it was a "typographical error."

Trainor explained that, as provided by Patrol Guide §203-12, "probable cause to believe..." is the totality of the circumstances which takes into account the members' training, expertise and the availability of evidence. He agreed that Patrol Guide §203-12 prohibits members from "cocking" their firearm. Trainor stated that the Patrol Guide

⁴ When shown DX 3, Trainor stated that the document was the final Shooting Report and that it was "the one and only supplement and final." When Corti was shown DX 3, he stated that it was the preliminary Shooting Report. At one point during his cross-examination, Corti stated in reference to DX 3, "In this report, this is marked the final report, not the preliminary report." In DX 3, before the start of paragraph 1, there is a heading labeled, "FINAL."

does not require members to hold a firearm with both hands, nor is it stipulated in the Patrol Guide that a police officer is required to see a weapon before discharging his firearm.

Trainor stated that during the course of his firearms discharge investigation, "every single shred of evidence, factor, witness testimony, Crime Scene evidence..." is taken into account. Although Trainor did not investigate the trajectory of the bullet, he did take into account the body positions of Respondent and Evans. He did not know if a trajectory report was prepared in this case, or if trajectory reports are prepared in such instances. Trainor evaluated the bullet wound sustained by Evans by reviewing the crime scene body sketch and photographs. He was not aware of a forensic or scientific analysis that might have been conducted to determine how the bullet might have moved into Evans' body.

Trainor testified that, for the purpose of inclusion in the Shooting Report, the transcriptions of the interviews of civilian witnesses and members of the service were not verbatim, but were made in sum and substance. He read those interviews before formulating his final report. Trainor stated that he did not use any direct quotations from any of the interviewees, other than Respondent, in the final Shooting Report.

Trainor agreed that a factor in determining probable cause could entail a complainant informing a member of the service that the suspect is armed. Trainor further agreed that other factors he considered included Evans discarding his backpack, fleeing from Respondent, hiding underneath the van and Respondent's fear for his own life.

Trainor's investigation revealed that Respondent made a tactical turn, held his firearm with two hands and before discharging his firearm, ordered Evans not to move five times.

Trainor has never requested that any member of the service be terminated subsequent to an investigation. He can recommend that the member receive Charges and Specifications, which could potentially result in termination.

When investigating the body position of Evans, Trainor said Respondent made two contradictory statements. In the first statement, Evans said, “[F]uck that, and began to stand up,” and in the second statement, Evans was in a “crouching position coming from the van beginning to come up.” Based on Respondent’s upright position, the location of the injury and all of Respondent’s statements, Trainor concluded that Evans was “down in a crouching-type position where [Respondent] was looking at the shoulder blades and the back of [Evans].” In other words, Evans’ head was pointed toward Respondent. Trainor said that Respondent told him that Respondent:

had taken up a position in the street approximately ten to 15 feet in an angular position standing in the street on I believe it was Vernon and the individual [Evans] was coming out of the van into a space approximately four foot seven between the front of his cargo van and the next car in front of it and was coming out from between both tires and the front axle. And [Respondent’s] testimony is that at this point this individual had looked around and stated “fuck that” and now started to become upright from - - emerging from this van.

Trainor believed that Evans’ statement of “fuck that” could either add to the probable cause scenario or indicate that Evans will surrender.

Trainor said he believed he was present for Jordan-Miller's official Department interview. Her testimony with regard to Evans' body position was consistent with Respondent's testimony.

Trainor averred that there was an extensive search in, around, and inside the undercarriage of the van but agreed that it was possible to secrete a weapon underneath the van.

Based on the Crime Scene Body Report, Trainor determined that the bullet entered Evans' body in the "general vicinity of his upper back between his shoulder blades." Trainor said that a trained detective from CSU prepares the Crime Scene Body Report by examining the body, and "relative to the nature of the injury, they would make an indication on the body." Trainor was shown a document at trial, which he identified as the preliminary Unusual Occurrence Report prepared by a supervisor in the Detective Bureau on the night of the incident. That report indicated that Evans was struck in the left shoulder, which Trainor said was "incorrect." Because Trainor did not prepare that report, he said that he would not be able to explain why this was incorrect or "why this person put that down there."

Trainor said that the radio transmission from the Communications Division that initially assigned Respondent the job was requested but was never received.

Trainor testified that between the knife and box cutter recovered from the scene, he only attributed the box cutter to Evans. Trainor was not able to describe the knife. Trainor was not aware if any forensic examination of the knife was done.

Trainor stated that The Board concurred with his findings and recommendation, and The Board forwarded the case to the COD Board. The COD Board found that the

firearms discharge was a violation of Department guidelines and preferred Charges and Specifications.

The Kings County District Attorney's office declined to prosecute Respondent. Evans was charged with Criminal Contempt in the Second Degree and sentenced to six months to one year incarceration. In addition, a five-year full "stay-away" Order of Protection was issued on Person A's behalf.

Respondent was placed on modified assignment about two years after the completion of Trainor's investigation. As to why it took several years for Respondent to be placed on modified assignment, Trainor stated that at some point after he forwarded the investigation, there was a review of the most serious cases that were still outstanding in the Department. Trainor was contacted and a recommendation was made to evaluate whether Respondent should still be in possession of his firearm due to the nature and gravity of the charges levied against him. Trainor did not know what, if any, circumstances had changed during the two years that made the case more or less serious and that led to Respondent's modification.

During cross-examination, Trainor agreed that out of the 278 firearms discharge investigations he has conducted, there have been instances where he has found firearms discharges to be within Department guidelines. As a general policy, Trainor begins his investigation by giving the members the benefit of the doubt.

Trainor conducted Respondent's official Department interview and recalled that when he asked Respondent if he had observed a firearm in Evans' hand, Respondent replied, either, "I can't recall" and "no," or "I can't remember, no." When Trainor asked Respondent why he discharged his firearm, Respondent told him in sum and substance

that "he was afraid" or "fear[ed] for his life" because Person A had already informed Respondent that Evans was carrying a firearm, and Respondent felt that Evans was "coming at him." Respondent told Trainor that after Person A identified Evans, Respondent drove alongside Evans, rolled down his window and asked to speak with him. Trainor considered this approach by Respondent as "extraordinarily poor tactics," as he placed himself in a "very precarious situation." Respondent's actions suggested to Trainor that Respondent was not initially in fear of his safety.

According to Trainor, Evans fled from the scene not because he was approached by Respondent, but because he observed Person A in the backseat of the RMP. Trainor, during his investigation, did not ever determine from Respondent where Evans' alleged gun was located. Respondent believed that Evans, while underneath the van, was reaching with his right hand toward his waistband area and that "somehow [Evans'] arm motion, coupled with [Evans'] motion coming out of the van, led [Respondent] to surmise that [Evans] was armed with a handgun or a firearm."

Trainor concluded that Evans was on both hands and both knees while he was coming out from underneath the van and that it would not have been possible for Respondent to have seen Evans reach for his waistband. Trainor also learned (from Respondent's official Department interview) that after Respondent holstered his firearm, he placed Evans in handcuffs. Trainor said he believed that there was some contradictory testimony by other officers that they might have been the ones who secured Evans. Respondent did not observe Evans to be in possession of a knife, and he did not observe a firearm in Evans' hand.

During redirect examination, Trainor testified that he did not include, in DX 3, his conclusion that Respondent was not afraid of Evans as he approached him. Additionally, although Trainor agreed that it was a tactical error for Respondent to have holstered his firearm before securing Evans, he did not include this conclusion in DX 3. Trainor said that he is required to make a summary and finding, but he does not put down every reason for how he came up with his determination.

Trainor did not know if, during the initial interaction between Respondent and Evans, Respondent was able to observe Evans' hands or what the lighting conditions were in the area. Trainor's investigation revealed that when Respondent initially approached Evans, Evans did not make any threatening remarks to Respondent nor did Evans reach into his bag or pocket to try to grab something. Trainor said that Evans' bag was on his back at that point.

Trainor agreed that the Patrol Guide is silent on whether a member should or should not holster his or her firearm after discharging it. However, Trainor was trained to holster his firearm after the threat has subsided. Trainor did not ascertain from Respondent whether Respondent felt threatened or in danger after he discharged his firearm.

Trainor stated that he has been shot at numerous times, but he has never discharged his firearm in the performance of duty.

Upon questioning by the Court, Trainor said Respondent was 10 to 15 feet away, "at an angle away from the front bumper standing in the street facing northeast towards [Evans'] head." Jordan-Miller was by the passenger side of the vehicle, on the sidewalk,

and only observed Evans' lower body. Neither Respondent nor Jordan-Miller was positioned behind any kind of shield.

Walter Signorelli

Signorelli is a retired member of the service, an adjunct professor at John Jay College of Criminal Justice, and a practicing attorney. Signorelli has been a professor at John Jay for 15 years and belongs to the Department of Law, Police Science and Criminal Justice Administration. He has published three books, including Crisis of Police Liability Lawsuits. Signorelli retired from the Department in 1998, in the rank of inspector, after 31 years of service. During his tenure with the Department, Signorelli had reviewed more than 100 firearms discharges.

Signorelli has testified as an expert witness in other forums about 25 to 30 times in the areas of firearms discharge, claims of false arrest, improper investigations, negligence and violations of civil rights.

During *voir dire*, Signorelli said he testified in a firearms discharge case within the last year in Suffolk County, Long Island. He did not recall having his testimony suppressed or precluded.

Signorelli was qualified by the Court to testify as an expert witness with respect to whether the firearms discharge was within Department guidelines.

Signorelli testified that since he has a lot of cases, he is constantly keeping himself updated with the Patrol Guide. Signorelli reviewed Respondent's case, including all the material in the Shooting Report and testified that, under the circumstances, Respondent did not violate the standards of proper police practices and procedures or the

guidelines as provided by the Patrol Guide. Signorelli said that Respondent was "just firing to protect his own life."

Signorelli agreed that factors such as when Evans ran and hid from Respondent heightened Respondent's sense of caution. Signorelli did not believe that the events that led to the discharge were improper tactics by Respondent. Signorelli explained that after a member discharges his firearm and if his partner is covering the suspect, that member should holster his firearm and then place the suspect in handcuffs while his partner is still covering the suspect. Signorelli acknowledged that Respondent was not outside Patrol Guide guidelines when he holstered his firearm after discharging it.

Signorelli said that he has read hundreds of Shooting Reports. He agreed that an interview with the individual who placed the 911 call should have been included in the Shooting Report.

Signorelli has been a member of the Firearms Discharge Review Board and has reviewed about 70 or 80 cases. He stated that if a trajectory report was prepared, it should have been included in the Shooting Report. Upon reviewing the Shooting Report in this case, he determined that it was not complete because the Shooting Report contained references made to the entry of the bullet in the bullet wound, but those references were inconsistent.

Signorelli disagreed with Trainor's findings in the Shooting Report. He explained that Trainor "disregarded" other factors and that Trainor maintained there was a discrepancy in Respondent's account of the incident. Signorelli maintained that Respondent's testimony (at his official Department interview) was not contradictory because "I believe [Evans] was reaching for his waist without actually seeing the

person's hand. You make that inference from the fact of the person where their arm or the way the body is moving looks like a person is reaching for something." He continued, "It doesn't mean you have to see the person's hand, what's in the person's hand...if [Respondent] could see [Evans'] hand was empty, it would be a different case. He couldn't see his hand was empty because of his position and he is coming out from underneath the car."

While Signorelli was on The Board, he reviewed cases which involved members discharging their firearms without actually observing a firearm in the suspect's hand and those members were not necessarily found to have violated Department guidelines. During his tenure with the Department, he had seen "dozens and dozens of cases" where such members were not found to be in violation of Department guidelines.

During cross-examination, Signorelli agreed that instead of chasing Evans, Respondent could have followed him in the RMP and called for additional units. He also agreed that Respondent could have issued Evans a warrant card instead of pursuing him, since they had his pedigree information and knew his identity and where he lived. He stated that it is reasonable for a member to assume that a suspect is taking a tactical position by going underneath the van and behind the tires. Signorelli agreed that, arguably, Respondent could have taken a position which would have offered him cover. He stated that it would be an "error" if Jordan Miller holstered her firearm while Respondent attempted to handcuff Evans as there is no one covering Evans.

Signorelli stated that there were references to the bullet entry points that were inconsistent. In the first report, prepared on the day after the discharge, the entry of the

bullet was in Evans' upper left rear shoulder; however, the final report indicated that the bullet entry was in the middle of the back.

Signorelli acknowledged that he wrote the Forward section in his book, Crisis of Police Liability Lawsuits. In the Forward, Signorelli acknowledged the vulnerability of police officers to the lawsuit process through his experience as a defense attorney, and the exorbitant jury awards given to undeserving defendants, "Ahmad Evans being one of those defendants." Additionally, he acknowledged that police officers have been ill-prepared to defend themselves and their departments from frivolous lawsuits. Lastly, he acknowledged that he wrote this book to train police officers on how to conduct themselves during depositions and examinations.

During redirect examination, Signorelli acknowledged that Evans ran in the opposite direction of where Respondent's RMP was facing on a one-way street. Throop Avenue is a one-way street going northbound and Evans ran southbound. Signorelli said that since it would have been difficult for Respondent to make a U-turn, Respondent made a "quick decision" to chase on foot. Signorelli testified that a foot chase by a police officer does not violate Patrol Guide guidelines nor is it "frowned upon" by Commanding Officers. Also, he said it would be more dangerous to public safety if a police officer chases someone in an RMP as opposed to chasing someone on foot.

Signorelli testified that although it would have been proper police tactics for Respondent to have taken cover, it would not be improper if Respondent had tried to find cover behind a vehicle but did not have an opportunity to because Evans came out from under the van.

Signorelli acknowledged that in the second paragraph of the Forward from his book, he indicated that some lawsuits against police officers are in fact meritorious.

During recross-examination, Signorelli agreed that in emergency situations, members are allowed to drive down one-way streets.

Respondent

Respondent is a nine-year member of the Department and was assigned to the 79 Precinct at the time of the incident. He was placed on modified duty status about three years after the incident.

Respondent testified that on July 21, 2008, he was assigned to work from 11:15 p.m. to 7:53 a.m. with his partner, Jordan-Miller. At about 11:30 p.m., Respondent responded to a job involving a violation of an Order of Protection. While driving to the location, Respondent observed pedestrians flagging his RMP. At the corner of

[REDACTED], Respondent met the complainant, Person A, and her son, Person B. Person A was "really upset" and "really emotional" and "couldn't put into words what was going on." Respondent tried to calm her down so that Person A could explain what had happened. She told Respondent that she had an Order of Protection against Evans and handed Respondent a copy. Respondent determined that the order was a valid "stay away" order.

Respondent asked Person A and her son to get into the backseat of the RMP and then conducted a canvass of the area. While in the backseat, Person A indicated that Evans was violent and had a gun, and she described their domestic violence history. Respondent maintained that Person A said Evans had a gun and that she was speaking in the present tense. The second time Respondent canvassed the area, either Person B or

Person A shouted, “[T]hat’s him.” Evans was walking from the corner of [REDACTED]

[REDACTED], up [REDACTED] toward [REDACTED].

Respondent testified that he was trained to tactically park his RMP in a combat parking position “where you park with the tail first of the vehicle just in case you have to respond to a job, or to approach a certain emergency situation where you can pull off real quick.” He was also trained to approach a suspect safely and cautiously. Respondent testified, “I approached Mr. Evans, I had to make sure I had a distance between Mr. Evans, so when I pulled to the side, my vehicle is facing up towards the open roadway, so if Mr. Evans decides to pull out a weapon, I have an easy access to actually leave that location.” He continued, “So the way I maneuvered my vehicle, the front of the vehicle is actually facing towards the open roadway. So I pulled in slightly, and that’s when I engaged in a conversation with Mr. Evans.” Respondent was about one car length away from Evans.

Respondent indicated that he had a clear, unobstructed view of Evans as Respondent approached him. Respondent clearly observed Evans’ hands holding onto his drawstring backpack, which was around his shoulder. He did not observe a knife, firearm, or any other item in Evans’ hand at that time. Upon exiting the RMP, Respondent approached Evans and maintained an interview stance (Respondent’s body was bladed and his hand was near his firearm, which was away from Evans) as he engaged Evans. Respondent learned this stance as part of his training in the Police Academy. Respondent said that as he was talking to Evans, Respondent was walking closer to him. He stated, “I was just trying to get close enough to, you know, to actually apprehend Mr. Evans.”

While in the interview stance, Respondent said, "Can I talk to you for a second[?]" Evans replied, "[F]or what[?]" as he turned his head to the side and looked into the backseat of the RMP. Evans observed Person A and ran away toward [REDACTED]

[REDACTED]. Before Evans ran off, Respondent was able to "graze" the bottom of Evans' backpack while attempting to grab him.

Respondent gave chase on foot while Jordan Miller notified the Radio Dispatcher of the ensuing foot chase. When asked why he did not pursue Evans by car, Respondent said, "I was in hot pursuit. I couldn't go back...." Respondent instinctually chased Evans as he was only an arm's length away. Respondent continued to chase Evans on [REDACTED] and before he got to the corner of [REDACTED], he slowed down because Evans already turned onto [REDACTED] and Respondent lost sight of him for a few "seconds." Respondent slowed down and before making a wide tactical turn onto [REDACTED], he looked around the corner to see if Evans was actually there. Respondent continued onto [REDACTED] and observed Evans remove his backpack and walk toward the front of a parked van. Respondent ran behind the van and onto the road, and drew his firearm, but did not see Evans. Respondent held his firearm with both hands supported and had it pointed to the ground because he did not yet see Evans. He explained that under the circumstances, he had his firearm pointed toward the ground because it was the safest direction. Respondent then heard "scuffling" underneath the van, which he said "sounded like someone crawling." Respondent looked underneath the van and saw Evans.

This was the first time Respondent had ever drawn his firearm. At the time of the incident, Respondent was equipped with a Department-issued Glock 19. He had his

flashlight with him but did not need to use it because he was able to "actually see the side of Mr. Evans underneath the van." Respondent then pointed his firearm toward Evans and "gave him numerous orders not to move." Respondent said he told Evans "over five times" not to move. Respondent stated, "I just started screaming at him. I told him, don't move. I just started yelling at him not to move. I said, police, don't move. Then I was like don't move. Then I started swearing at him, don't fucking move." Respondent maintained that he was yelling loudly and even made eye contact with Evans, but Evans continued to move toward the front of the van.

At the time Respondent made eye contact with Evans, Respondent was about three feet from Evans; and Evans was between all four tires, closer to the center of the roadway where Respondent was able to see one side of Evans' body from "head to toe." Evans ignored Respondent's orders to not move and continued to move forward while Respondent, with the belief that Evans was going to pull out a firearm, started to walk backwards to create distance and so that he could take cover behind a parked vehicle across the street from the van.

Respondent testified that although he is trained to take cover in this type of situation, he was unable to do so because "[Evans] came out so quick it was just a matter of seconds. I didn't even get a chance to even cross the street. I was actually in the middle of the roadway when Mr. Evans actually came out from underneath that van." He did not know where Jordan-Miller was and did not look for her as he did not want to lose sight of Evans.

Respondent explained that Evans "was crawling to the front from where he entered, and he goes in between the two front tires. As he is about to come out, he turns

over and now he is no longer underneath the van, he is between the van and the car parked in front of him, in that open space, like four-and-a-half feet.” Respondent described Evans’ position as “actually perpendicular to the van. Parallel to the bumper of the van.” Evans’ head was pointed toward Respondent and Evans was on his belly in a “pushup position” where his hands were between his chest and waist. Respondent said that, as Evans was raising himself up from the ground, “his hands and his body in like one continuous motion, kind of like he is slouched over, his head is looking at me, then he looks down and as he is getting up, and he says fuck that. At the time, his hands and his arms were bent in a way where it was around his waistband area, and that’s when I discharged my weapon.” Respondent indicated that Evans’ hands were “[g]oing towards his waistband area” as he was getting up.

It only took “seconds” for Evans to raise himself up in one quick motion. Respondent stated that he was “stuck in the middle of that roadway” because Evans came out from underneath the van “too quick[ly],” and he felt as if Evans was going to shoot him. With regard to how he felt at that point, Respondent said, “I was scared of getting shot. I was scared of not coming home. A lot of things run through your mind. I was afraid of losing my life.” Respondent believed Evans was going to shoot him because he ran away from him and “was going to do whatever he had to do to get away from [me]. If it was taking my life, he would have done so just to get away.” Respondent stated that Evans said, “[F]uck that,” in a “nasty,” “confrontational” way. Respondent testified that he was only able to observe Evans from his waist up as he was coming up from the ground because of the lighting condition. The streetlight was located behind Respondent

and Evans was facing Respondent, so as Evans was coming up from the ground, the light cast a shadow on Evans' lower half of his body.

Respondent stated that Evans said, “[F]uck that,” as he was getting up and “reached to his side,” and that was when Respondent discharged his firearm. Respondent said he shot Evans in his upper shoulder. After he discharged his firearm, Respondent said that Evans “fell onto the ground.” He observed Jordan Miller come from behind Evans with her firearm pointed toward Evans. Jordan-Miller was positioned closer to Evans than Respondent was. Respondent was still in the middle of the roadway and Jordan-Miller was right behind Evans. Respondent said that, at that point, he still had his firearm drawn.

In less than five seconds after Respondent discharged his firearm, additional units arrived and Jordan-Miller asked Respondent to holster his firearm. Respondent holstered his firearm and placed his handcuffs on Evans while Jordan-Miller provided cover. Respondent said that Evans was still moving and Jordan-Miller continued to yell at Evans to stop moving. Greenaway, one of the first officers to respond to the scene, told Evans to stop moving but he would not.

Respondent said that he used his handcuffs to secure Evans. Greenaway was going to handcuff Evans, but she started to put gloves on due to the blood on Evans' back. Respondent said that he “went physically to put Mr. Evans’ hands behind him and cuffed him.” Evans went to the hospital in Respondent’s handcuffs, and the handcuffs were returned to Respondent two weeks later. Respondent stated that at the time that Greenaway was on the scene, Respondent still believed that Evans may have had a gun

"[b]ecause of everything from what the complainant stated, to the whole foot pursuit, the fact that he was hiding from me, I had reason to believe that he had a weapon."

After Evans was handcuffed, Respondent was transported to a hospital because he was out of breath and had a ringing sensation in his ear. He could not recall to which hospital he was transported.

Respondent testified that he was trained to approach domestic incidents cautiously because weapons might be involved.

After this incident, Respondent remained in full-duty status for three years and was then placed on modified assignment.

Evans brought a lawsuit against Respondent, Jordan-Miller, the Department and the City of New York. Respondent also brought a lawsuit against the Department. Evans was found guilty of violating an Order of Protection.

Respondent stated that the Department has 18 months to bring Charges against a member and that he was served with Charges about 17-½ months after the incident.

During cross-examination, Person A told Respondent that "[Evans] had a gun, and he did it once before." Respondent did not ask Person A to describe the firearm, and neither he nor Jordan Miller called for back-up when Person A mentioned the gun.

Respondent stated he was not in fear of his life when Evans ran away from him nor did he observe a firearm in Evans' hand. After briefly losing sight of Evans and then turning onto Vernon Avenue, Respondent observed Evans "taking off his backpack as he returns to the front of the van and actually makes a left in front of the van." He did not see Evans reach inside the backpack. He said he did not see Evans actually going underneath the van. He did not recall if he was asked during his official Department

interview whether he saw Evans going underneath the van, but he had told Trainor at the interview that it was the scuffling that drew his attention to the van.

Respondent maintained that the lighting condition on the roadway (where he was standing) was good and that the street light was behind him while he had his firearm drawn on Evans. As one gets closer to the curb, there is a shadow cast and the lighting condition becomes poorer.

At the time when Evans was coming out from underneath the van, Respondent was walking backwards and was at least 10 feet away. Respondent then observed Evans reach for his waistband area, where he believed Evans had his firearm. Respondent agreed that as Evans was coming out from underneath the van, Respondent did not see a firearm in Evans' hand, nor a gun underneath the van, nor a gun on the side of the van by Evans' backpack. Evans was on his stomach in a push-up position with his hands between his chest and waist. Respondent denied that Evans was on all fours. Respondent stated, "When I actually shot Mr. Evans, he was slouched over. He was no longer on the ground. He was slouched over...he was looking at me, then he looks down...and he says fuck that, as his hands is raising and his arms are going towards his waistband area. That's when I shot him, when he said fuck that and reached, that's when I shot." Respondent said that, as Evans started to "raise up, his head is down. That's how I ended up shooting him in the upper back....He was looking down. Kind of looks like he was looking at his waistband area as he was getting up. That's how down his head was as he is slouched over. He is not fully erect, he is not on the ground when I shot Mr. Evans."

Respondent said that he recalled Evans saying, "You shot me," after he was shot. Respondent said that he did not immediately holster his weapon after Jordan-Miller told him to. He denied that Greenaway was the one who handcuffed Evans.

During redirect examination, Respondent testified that the entire area underneath the van was not fully illuminated. Respondent indicated that Evans' "waistband area and his hand area" were not illuminated when Evans was reaching for his waistband area. Respondent testified that he did not use his flashlight nor did he need it.

During examination by the Court, Respondent said he did not know if Evans "flipped over" while underneath the van. Respondent could not recall if Evans was lying face down or face up when he was underneath the van, but Respondent was able to see one whole side of Evans' body. He did not know if it was the left side or right side of Evans' body that he saw. He said a matter of "seconds" had elapsed from the time he lost sight of Evans to the time he saw him underneath the van.

During recross-examination, Respondent stated that he lost sight of Evans twice: when Respondent made the tactical turn around the corner; and when Evans turned to the front of the van and took off his backpack.

Respondent said that at the time that he discharged his firearm, Evans was not in the push-up position. Evans was "[n]o longer on the ground, he is not fully erect, he is slouched over." When asked if Evans was on his knees, Respondent stated, "I don't know if he was on his knees or not. I don't recall if he was on his knees or his feet, but I know his hands were no longer on the ground, going towards his waistband."

During examination by the Court, Respondent maintained that while Evans was underneath the van, Evans' feet were toward the curb and his head was toward Respondent.

FINDINGS AND ANALYSIS

Respondent stands charged herein in that while assigned to the 79 Precinct, while on-duty, on or about July 22, 2008, at a location known to this Department, in Kings County, he did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer did discharge his firearm outside of Department guidelines. Evidence adduced at trial established that Respondent was working patrol in a marked RMP with his partner, Police Officer Jordan-Miller when they received a radio run of a violation of an Order of Protection. When they arrived at the location where the victim, Person A, was, she stated, "He [Evans] just left." Person A also stated that she believed Evans had a gun. Person A got in the back seat of the RMP along with

[REDACTED] and they canvassed the area for Evans.

At the corner of [REDACTED], Person A spotted Evans. Respondent began to exit the RMP as he asked Evans to speak to him. According to Jordan-Miller, Evans peered into the RMP and when he saw Person A [REDACTED], he took off running. Both Respondent and Jordan-Miller began a foot pursuit of Evans. Respondent was able to grab the knapsack that Evans was wearing, but was unable to actually take possession of the knapsack or get Evans to stop running. Jordan-Miller stated that at no point did she observe a weapon on Evans. Jordan-Miller testified that she lost sight of Respondent and Evans for a little bit as they proceeded down Throop Avenue toward Vernon Avenue. She said Respondent made a tactical turn or wide turn

and stopped for a moment before he proceeded down Vernon Avenue. When she arrived at that location, Jordan-Miller observed Respondent in the street. She proceeded to the sidewalk and searched for Evans. Respondent indicated to her that he was "right there," but Jordan-Miller did not see Evans. Jordan-Miller testified that she and Respondent repeatedly yelled to Evans, "Don't move."

According to Jordan-Miller, she first saw Evans as he came from underneath a vehicle and was rising up with his hands as if he was reaching for something and then she heard a "pop." Both Respondent and Jordan-Miller had their weapons drawn at that time. Jordan-Miller testified that at first she did not know where the gunshot came from, but then she figured out that Respondent had discharged his firearm. She holstered her weapon and told Respondent to do the same, and he complied. They both continued to tell Evans not to move, but Evans continued moving.

Jordan Miller testified that she saw Evans "raising his hands up" as if he was reaching for something. The fact that she saw Evans rising up with his hands meant that his hands were visible. Jordan-Miller also testified that once she realized that Respondent had discharged his firearm, she immediately holstered her weapon so as not to have accidental discharges and told Respondent to do the same. She testified that this was done despite the fact that there was no determination whether Evans had a gun, he was not subdued because he was still moving, and he was not handcuffed; therefore, he was still a potential threat.

Respondent testified essentially the same as Jordan-Miller in that he began a foot pursuit of Evans and grazed his knapsack, but was unable to stop him. He made a tactical turn and pursued Evans. As Respondent turned the corner onto [REDACTED], he lost

sight of Evans for a moment. Respondent heard scuffling under a vehicle and decided to withdraw his firearm from his holster with two-hand support. Respondent testified that he was in possession of a Glock 19 and that this was the first time in his career that he withdrew his service firearm.

Respondent said that he was able to see Evans under the van. He saw his entire side and therefore was not in need of his flashlight. Respondent screamed to Evans not to move, but Evans continued to move up as he was under the van. Respondent said that he moved himself back as he attempted to take cover. Respondent had no idea where his partner was at that time because he was focused on Evans and recalled telling him not to move at least five times. Respondent stated that Evans came to the front of the two wheels of the van. According to Respondent, Evans then turned over and was no longer underneath the van. Evans was in the four-and-a-half foot open space between the van and a car parked in front of it. His head was toward Respondent and his feet were toward the curb. Evans was on his belly and placed his hands in a push up position. Respondent said that as Evans was raising himself up from the ground, he was slouched over and his hands and arms were bent in a way that it was around his waistband area. That was when Respondent discharged his weapon. This account is inconsistent with Jordan-Miller who testified that she never saw Evans' entire body out from under the van. Respondent described Evans as slouched over and Jordan-Miller said Evans was "rolling" at the time. Respondent told Evans not to move just before that and Evans replied, "Fuck that," and Evans reached to his side. Respondent then fired one time into Evans' upper shoulder area. Respondent described being able to see Evans from his waist area upward; but the way the light was cast outside, he was unable to see Evans' lower half of his body.

Respondent testified that his partner, Jordan-Miller, was covering Evans at the time with her gun out. She was closer to Evans than he was. Within five seconds of the shooting, he said units converged on the area. Respondent said he then handcuffed Evans as Jordan Miller covered with her weapon. But this is inconsistent with Jordan-Miller's testimony. Jordan-Miller testified that after she heard the "pop" [the gunshot] and heard Evans state, "You shot me," she immediately holstered her weapon and told Respondent to do the same. She elaborated on her safety concerns regarding accidental discharges and being in front of Respondent, who had fired at Evans. This means that Jordan-Miller was not in a position to cover Respondent as he handcuffed Evans. In addition, when Jordan-Miller was questioned directly as to whether Evans was handcuffed at the time both she and Respondent holstered their weapons, Jordan-Miller stated that she could not recall. She was also asked whether she knew if Evans had a gun on him when both her and Respondent's guns were holstered and she replied, "No."

Respondent testified that the shooting occurred on July 22, 2008. He remained full duty following the shooting and worked in Brooklyn North Task Force for three years before he was placed on Modified Assignment at the end of 2011. He noted that criminal charges were never filed against him. However, criminal charges were filed against Evans who served time for violation of the Order of Protection. Respondent noted that he, Jordan-Miller, the Department and the City of New York were eventually sued by Evans.

Evans testified that he initially met Person A on a networking site. She had issues in her life that affected their relationship. They got into a physical altercation in which she struck him and he struck her. Evans was arrested and an Order of Protection

was issued. He violated the Order of Protection and was arrested again. He noted that the Order of Protection required him to stay a certain distance away from Person A and not to make telephone calls to her. Evans stated, however, that there were unresolved issues between them that he wanted to resolve and that Person A's relationship with her baby's father affected their relationship.

On the night in question, Evans testified that he had a couple of drinks with his friends in the vicinity of [REDACTED] between [REDACTED], but he may or may not have had alcohol. When he left that location, it was his intent to go to a friend's house [REDACTED], but on the way there, he passed [REDACTED]. Evans claimed that it was not his intent to go by her place. He was en route to [REDACTED] [REDACTED]. He decided to walk through the park to get to [REDACTED]. On the way, he passed the corner of [REDACTED] where Person A lived. Person A happened to be outside. Person A went into what Evans described as an "hysterical rage." She seemed surprised and scared. She cursed and words were exchanged between them. Evans said he was just passing through the area. Person A said she would call the police.

Evans said that he went down [REDACTED] and made a right on [REDACTED] [REDACTED]. He saw a police car on the corner of [REDACTED] avenues. The police officer asked if he could speak to him. Evans said he knew he would be arrested and he did not want to go back to jail. He said he saw Person A and her son in the back of the police car and in his fear, he ran. Evans stated that he had a blue Nike knapsack on his person which contained a box cutter that he used for work. He said he also had a black cell phone on the left side of his waist area because he was left-handed.

Evans recalled the police officer grabbing and removing his knapsack, but the officer did not grab him. Evans ran around the corner on the right side of [REDACTED] and then he went under a van for protection. Evans recalled that as he slid under the van, he could not turn over. He could only crawl from side to side or move forward or backward. Evans testified that he was under the van, lying on his stomach and that his head was toward the front, driver's side. Evans said that Respondent stood in front of the van. He did not think that Respondent saw him because he walked away. At some point he believed somebody told Respondent that he was under the van because Respondent came back, told him not to move or he will shoot. Evans then moved back and Respondent fired. Evans estimated that Respondent stood two to three feet away from the van in the street. The police officer who was with Respondent grabbed his firearm.

Evans said that once he was shot, he could not move his legs or move from under the van. He said he was shot in the back, left shoulder area. The entry of the bullet wound was below his nape or neckline. Evans said that the bullet traveled to the right side of the muscle on his right arm. Evans maintained that he was under the van when Respondent shot him. He acknowledged that he did hear Respondent tell him not to move, but he did shift as he remained under the van and was shot there. Eventually Evans was grabbed and pulled by the hands from under the van. The next thing he recalled was passing out in the ambulance with a mask on his face and he was having pain in his back and was bleeding profusely. Evans said that once he was in the ambulance, he was placed in handcuffs.

The seminal question in this matter is whether Respondent used proper police tactics as he stood in the middle of the street ordering Evans not to move as Evans

continued to disobey his command and move as he was under a van. Detective Darrell Corti of the Firearms and Tactics Section testified before this tribunal. Corti is a Master Instructor and Training Coordinator. He testified that he has taught over 100 courses and trained over 1000 students since 2004. In addition to his Department training, he is a Master Sergeant in the military police and has spent 28 years in the United States Air Force where he has also trained several thousand military students. Corti testified that police officers are trained to make use of several tactics when engaged in street encounters. One such tactic is to take cover from whatever is available. This gives the police officer the opportunity to think about what action to take next. The fact that Respondent remained in the middle of the street with his gun drawn ordering Evans not to move while Evans continued to move, left Respondent with fewer options than he would have had had he taken some type of cover, even if it was crouching behind a parked car. He would have had an opportunity to shine his flashlight, call for backup, confer with his partner on a course of action, and collaborate possibly to use other forms of force such as pepper spray or the baton to subdue the moving suspect.

Respondent testified that everything happened so quickly, that he did not have time to take cover. Yet, the evidence points to the contrary. Respondent testified that he had enough time to order Evans at least five times to stop moving. And he watched as Evans shifted position underneath the van, then coming partially out from under the van, to moving to a push-up position. It appears that Respondent had time to retreat and take cover.

This incident occurred in the late evening hours. Corti also stated that Respondent would have had the use of his flashlight as another aid. Although

Respondent testified that he could see Evans' body under the car and had no need for his flashlight, Corti testified that the flashlight could have been used to illuminate the area underneath the van to ascertain whether Evans had a gun. He also stated that the flashlight could have been shined in Evans' eyes which may have caused Evans to block the light with his hands, enabling Respondent to see whether or not Evans had a weapon. Respondent, however, did testify that although he could see the top half of Evans as he was emerging from the vehicle, he could not get a clear view of the lower half of his body because of the way that the light was cast in the street. Use of his flashlight together with his firearm could have been a useful tool given the circumstances. Of particular importance is the fact that the Patrol Guide stresses the importance of the flashlight (§ 203-11, Use of Force, effective January 1, 2000): "If the area is dark, a flashlight or other source of illumination should be used to maintain a clear view of the subject at all times." At the point where Respondent was in fear for his life such that he felt deadly force was needed, Respondent had a duty to first retreat and take cover and to avail himself of other options at his disposal before he used deadly force. In this instance, Respondent only availed himself of the use of deadly physical force.

Respondent made mention during his testimony that during his foot pursuit of Evans, he made a tactical turn around the corner to [REDACTED]. It is suggested that Respondent was making use of training tactics as he pursued Evans. Yet Respondent and his partner put their guns away before Evans was placed in custody, which leads to two assumptions. Either Respondent believed that Evans was not armed, or the use of tactics was really not the priority at that time. Respondent did testify that he saw Evans rising up in a "push-up" type position. This lends credence to the notion that Respondent was

able to see Evans' hands at that time. Respondent made a point to then state that Evans was now "slouched over" with his hands and arms around his waistband area at the time Respondent fired his weapon. Yet the issue of illumination comes to the forefront again. Respondent testified that because of the way the light was cast, Evans' waistband area and hand area were not illuminated. How could he then testify that Evans' hands and arms were around his waistband? Respondent's use of his flashlight would have clarified his observations. Respondent testified that he used his firearm because he was "scared of being shot." Corti made it clear that fear could not be the driving force in taking police action under these circumstances. Respondent needed to retreat and take cover to allow him the opportunity to fully assess the situation, making use of all that was tactically available to him to ensure that any potential attack on him was with a gun.

Respondent presented the expert testimony of Walter Signorelli in his defense. However, the majority of Signorelli's testimony supported the prosecution's position in this matter and not the defense's position. Signorelli is a retired member of the service who is currently an adjunct professor at John Jay College of Criminal Justice as well as a practicing attorney. Signorelli retired from the Department in 1998 in the rank of inspector after 31 years of service. He testified that he had reviewed more than 100 firearms discharges in his career. Signorelli said that he reviewed the paperwork in Respondent's case. He stated, "I believe [Evans] was reaching for his waist without actually seeing the person's hand. You make that inference from the fact of the person where their arm or the way the body is moving looks like a person is reaching for something." He continued, "It doesn't mean you have to see the person's hand, what's in the person's hand...if [Respondent] could see [Evans'] hand was empty, it would be a

different case." As previously stated, there was testimony that Respondent saw Evans rising up as if in a push-up position so Respondent would have been able to see his hands. Therefore it stands to reason that if Evans was pushing up, Respondent would have been able to see his hands. This supports Signorelli's assertion that if Respondent saw Evans' hands this would be a different case.

Respondent did not testify that he saw Evans reaching from one side to the other. There was some testimony from Evans that he reached with his right hand for his cell phone, which was located on his left hand side. But of fundamental importance is Respondent's account of what transpired. He testified to Evans "rising up," not reaching for something. In addition, if Respondent had positioned himself in a safe place, he could have assessed whether Evans was reaching for a cell phone or not.

Signorelli also testified that he did not see a problem if Respondent went to handcuff Evans and his partner continued to cover Evans with her firearm. He said it would be an "error," however, if Jordan-Miller put her firearm away while Respondent attempted to handcuff Evans because no one would be covering Evans. The error was the case with Jordan-Miller and Respondent. Both Respondent and Jordan-Miller put their firearms away before Evans was placed in handcuffs and searched for a firearm.

Although Signorelli testified that he kept up with revisions in the Patrol Guide in his practice, he left the Department in 1998, 15 years ago when the Patrol Guide as well as training in the Police Academy have changed from the time Signorelli worked as an inspector. Specifically, effective January 1, 2000, major revisions to the Patrol Guide were made and Respondent, who was appointed to the Department in 2004, was responsible for knowing the tenets of the Patrol Guide, particularly as they pertain to the

use of force (§ 203-11) and deadly physical force (§ 203-12). Patrol Guide § 203-11 states in pertinent part:

The primary duty of all members of the service is to preserve human life. Only that amount of force necessary to overcome resistance will be used to effect an arrest....Deadly physical force will be used ONLY AS A LAST RESORT and consistent with Department policy and the law. (Emphasis added)

As previously noted, deadly force is only to be used after other tactics, particularly those involving the use of force (i.e. pepper spray, retractable baton) available to Respondent have been exhausted.

Patrol Guide § 203-12 goes on to further elaborate on the responsibility of members of the service regarding the use of deadly physical force. It states in pertinent part:

The New York City Police Department recognizes the value of all human life and is committed to respecting the dignity of every individual. The primary duty of all members of the service is to preserve human life.

The Patrol Guide goes on to specifically delineate instances when the use of deadly force is not to be used or when police officers are not to discharge their weapons:

- a. *Police officers shall not use deadly physical force against another person unless they have probable cause to believe they must protect themselves or another person present from imminent death or serious physical injury.* (Emphasis added)
- d. *Police officers shall not discharge their firearms to subdue a fleeing felon who presents no threat of imminent death or serious physical injury to themselves or another person present.*

In this instance, Respondent and his partner engaged in a foot pursuit of Evans as he attempted to flee. As Respondent pursued Evans, Evans did not, for example, turn and fire a weapon at Respondent or his partner. Jordan-Miller testified that she never saw Evans with a weapon. Detective George Boston, the Crime Scene Investigator, a 27-year

member of the Department with over 20 years of experience working crime scenes, testified that he recovered only one firearm at the crime scene which belonged to Respondent. He searched for evidence in this matter for over five hours and was unable to recover any other firearm. Police Officer Greenaway, who was one of the first officers to arrive on the scene following the shooting, searched Evans. She did not recover a firearm. Aside from fleeing and hiding under a vehicle, Evans did not engage in any conduct which would have raised Respondent's sense of the situation to the point of probable cause to believe that he must protect himself or Jordan-Miller from imminent death or serious physical injury with the use of deadly physical force.

It is clear from these provisions of the Patrol Guide that although Signorelli concluded that Respondent's action of discharging his firearm was not outside of Department guidelines, a review of these two provisions state otherwise.

Accordingly, Respondent is found Guilty.

PENALTY

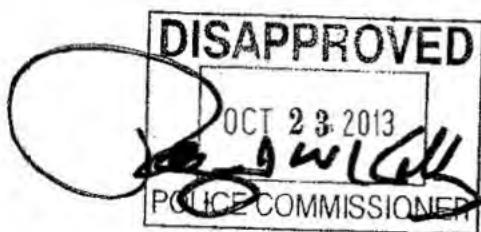
In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of having engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he discharged his firearm outside of Department guidelines. The Assistant Department Advocate asked for a

penalty of termination. The Court agrees. At the time of the incident, Respondent had been a police officer for over four years. According to Corti, Respondent received firearms and tactics training in the Police Academy. In addition, Respondent attended two firearms requalification sessions each year in the subsequent three years. There is no reason to believe that Respondent was not properly trained in firearms use and tactics. Yet on this date, the only tactic Respondent used at the time he confronted Evans was deadly physical force. Not surprisingly, when the target was in a confined space under a vehicle, the one shot fired made contact. The injury Evans sustained caused serious and apparently permanent injury in that Evans is a paraplegic and can no longer use his legs. Evans is confined to a wheelchair.

Respondent's use of deadly force in this instance calls into question the ability of Respondent to continue to serve as a viable member of the Police Department. Therefore, it is recommended that Respondent be DISMISSED from his position as a police officer with the New York City Police Department.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL HERNANDEZ
TAX REGISTRY NO. 934333
DISCIPLINARY CASE NO. 2009-0279 (86014/09)

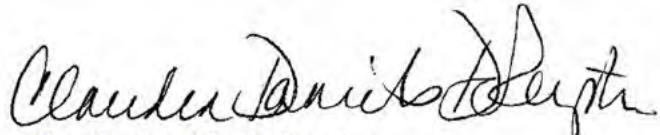
In 2009, Respondent received an overall rating of 3.5 “Above Competent” on his annual performance evaluation. In 2011 and 2012, he received a rating of 3.0 “Competent.” Respondent has received one Excellent Police Duty Medal in his career to date.

[REDACTED]

[REDACTED]

Respondent has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials